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RECENT CASES

Bankruptcy—Res Judicata—Proof of Non-Dischargeability of Judgment Under Section 17(a)

Plaintiff, holder of two Vermont judgments against defendant, duly scheduled them against defendant in bankruptcy. Later, an effort to have the judgments discharged in a state court was resisted by plaintiff on the grounds that they were for a "willful and malicious injury" within section 17(a) of the Bankruptcy Act, and, therefore, excepted from discharge.[1] The claim was based on the granting by the original Vermont trial court of plaintiff's motion for a certificate that close jail confinement was justified to enforce his judgments, a procedure authorized by Vermont statute only when the ". . . cause of action arose from the willful and malicious act or neglect of the defendant."[2] *Held:* the judgments were discharged. The meaning placed on the words "willful and malicious" by the Vermont court was broader and more inclusive than that ascribed to the same words in the Bankruptcy Act; therefore, the finding of the Vermont court was not res judicata as to the dischargeability of the judgment.[3]

It is generally held that a court may not go beyond the record of the court in which a judgment was rendered to determine whether the cause of action was one for a "willful and malicious injury;"[4] however, there is authority to the contrary. The reasoning advanced for this rule has been that to look behind the record would amount to collateral attack,[5] in violation of the rule of res judicata. A few courts have adopted a middle view, holding that where the record is am-

[1] 30 Stat. 550 (1898), as amended, 11 U.S.C. § 35 (1946). Section 17(a) reads: ". . . a discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . except such as . . . (2) are liabilities . . . for willful and malicious injuries to the person or property of another. . . ."

[2] Vt. Rev. Stat. § 2246 (1947).

[3] Schenfeld v. Lawlor, 281 App. Div. 265, 119 N.Y.S.2d 415 (1st Dep't 1953).

[4] Consol. Plan of Connecticut v. Bonitatibus, 130 Conn. 199, 33 A.2d 140 (1943); Rice v. Guider, 275 Mich. 14, 265 N.W. 777 (1936); Ehnes v. Generazzo, 19 N.J. Misc. 393, 20 A.2d 513 (C.P. 1941). Cf. In re La Porte, 54 F. Supp. 911 (W.D.N.Y. 1943); In re Danahy, 45 F. Supp. 758 (W.D.N.Y. 1942). Also see Peerson v. Mitchell, 205 Okla. 530, 239 P.2d 1028 (1950), cert. denied, 342 U.S. 866 (1951).

When accord and satisfaction has replaced the judgment for willful and malicious injury, and an action is subsequently brought on this new agreement, the question of whether the court will go beyond the record of the original action is of prime importance. Treatment of this question, however, is beyond the scope of this note.

[5] See In re Stone, 278 Fed. 566, 567 (N.D.N.Y. 1922); Nichols v. Doak, 48 Wash. 457, 459, 93 Pac. 919, 920 (1919) ("The judgments had stood for years unattacked by appeal or otherwise. To have allowed the contradiction of the terms of the judgments . . . would have permitted in this action a trial of the former actions upon their merits. Such would have amounted to a collateral attack on the judgments."); Peerson v. Mitchell, 205 Okla. 530, 239 P.2d 1028 (1950).

biguous,[6] or fails completely to disclose the nature of the action,[7] evidence *aliunde* may be introduced. The general refusal to go beyond the record of the original action means that this record must necessarily control the inspecting court's decision, and raises the problem of what must be established in the record to show a judgment for "willful and malicious injury."

"Willful and malicious injury" is defined by the universally accepted "*Tinker* rule" as ". . . willful disregard of what one knows to be his duty, an act which is against good morals, and wrongful in and of itself, and which necessarily causes injury and is done intentionally." [8] Success or failure of the judgment creditor depends upon the legislative intent which the examining court feels is behind the "willful and malicious" exception, and the accuracy with which this guides the court in measuring each situation, as it appears from the record, against the "*Tinker* rule."

The type of conduct which will except a judgment from discharge varies widely with the type of offense in issue,[9] and may vary greatly from state to state when the same type of offense is being examined. For example, in automobile accident cases, there may at one extreme be a demand that "malice" be involved,[10] and at the other, an acceptance of conduct which is "reckless indifference."[11] This diversity of holdings emphasises the difficulties faced by the judgment creditor seeking to perfect a judgment which will bind an examining court to hold his debt non-dischargeable. The instant case further illustrates how difficult the problem my be in practice. Even where the judgment describes the acts of the defendant as "willful and malicious," the creditor may not have met the standard of the Bankruptcy Act.

Another recent case has held that inquiry should not be confined to the record.[12] This ruling would seem to serve the purpose of the Bankruptcy Act in ascertaining those persons who are "honest debtors"

[6] Peters v. United States, 177 Fed. 885 (7th Cir. 1910); Bannon v. Knauss, 57 Ohio App. 288, 13 N.E.2d 733 (1937).

[7] See Bannon v. Knauss, 57 Ohio App. 288, 13 N.E. 2d 733 (1937).

[8] Tinker v. Colwell, 193 U.S. 473 (1904).

[9] In "dog-bite" cases, the willfulness of the conduct may be implicit in the cause of action. Jaco v. Baker, 174 Ore. 191, 148 P.2d 938 (1944). In conversion cases, the willful and malicious nature of the conversion must be proven. In re Nordlight, 3 F. Supp. 486 (S.D.N.Y. 1933). In automobile accident cases, the standard is varied. See cases cited infra notes 10 and 11. In assault cases, willful and malicious conduct may be part of the very nature of the tort. Peters v. United States, 177 Fed. 885 (7th Cir. 1910). Contra: In re De Lauro, 1 F. Supp. 678 (D. Conn. 1932).

[10] In re Vena, 46 F.2d 81 (W.D. Wash. 1930). Contra: In re Greene, 87 F.2d 951 (7th Cir. 1937) (". . . willful and malicious as used in the Bankruptcy Act . . . need not involve actual malice as we usually think of the term.").

[11] In re Kubiniec, 2 F. Supp. 632 (W.D.N.Y. 1932).

[12] Fidelity & Cas. Co. of New York v. Golombosky, 133 Conn. 317, 50 A.2d 817 (1946).

and giving them a fresh start. It could well be effectuated by a new finding of fact, since the creditor often may not foresee bankruptcy and not consider the issue of the reprehensible nature of the conduct. However, it would seem that there would be difficulties of proof, especially in cases where the judgments had not been acted upon for years; and, in some instances, there would be hardships worked on third parties.[13]

To best solve the problem of perfecting a non-dischareable judgment, it would appear that counsel for the judgment creditor should get a special finding in the original judgment,[14] phrased in terms of the "*Tinker* rule." In lieu of this, he can best serve his client by getting into the record sufficient facts concerning the nature of the cause of action to lead the examining court to the same conclusion.

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[13] See Donald v. Kell, 111 Ind. 1, 11 N.E. 782 (1887). A judgment obtained before bankruptcy was sought to be enforced against land conveyed by a grantor after his discharge in bankruptcy. Held: "A purchaser is bound only by what the record discloses. . . . It would make titles insecure to permit a creditor in such a case to go back of the cause of action . . . and defeat the purchaser by proof that it was not such a cause of action as it purported to be."

[14] Cf. In re Burchfield, 31 F.2d 118 (W.D.N.Y. 1929).